Petition

81-1115

Office - Supreme Court, U.S.
FILED
DEC 15 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY, *Petitioner*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JENKINS GARRETT
STEVE M. KING
GARRETT & STAHALA
1705 Commerce Building
Fort Worth, Texas 76102
(817) 332-8484

FRANK D. McCOWN
1702 Commerce Building
Fort Worth, Texas 76102
(817) 335-8080

GRIFFIN B. BELL
JAMES D. MILLER
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705
Of Counsel

Fort Worth Brief Printing Co., 610 South Jennings Street Phone 817-332-4070

QUESTIONS PRESENTED FOR REVIEW

1. Does Title VII of the Civil Rights Act of 1964 authorize the Equal Employment Opportunity Commission to take jurisdiction over the religious activities of churches?

2. Do the Religion Clauses of the First Amendment forbid the Equal Employment Opportunity Commission from taking jurisdiction over the religious activities of churches?

LIST OF PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains all parties named in the proceeding below, namely, SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY (Seminary) and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC).

The Southern Baptist Convention operates six seminaries, including Petitioner. The five other seminaries hereafter listed are parties at interest, notwithstanding not being parties to this action, under agreement of attorneys that the disposition of the issues in this case shall be binding and control as between the EEOC and these five listed seminaries:

Golden Gate Baptist Theological Seminary
Midwestern Baptist Theological Seminary
New Orleans Baptist Theological Seminary
Southeastern Baptist Theological Seminary
Southern Baptist Theological Seminary

Except as listed above, Southwestern Baptist Theological Seminary has no parent companies, affiliates or subsidiaries, except the wholly owned non-profit subsidiary, Southwestern Baptist Theological Seminary Development Foundation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS DELIVERED IN COURTS BELOW 1

GROUNDS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE

(a) SUMMARY 2

(b) PARTIES 3

(c) THE JURISDICTION OF EEOC AND THE EEO-6 REPORT 5

(d) DISTRICT COURT'S DECISION 6

(e) FIFTH CIRCUIT'S DECISION 9

REASONS FOR GRANTING THE WRIT

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT AUTHORIZE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO TAKE JURISDICTION OVER THE RELIGIOUS ACTIVITIES OF CHURCHES. 12

B. THE RELIGION CLAUSES OF THE FIRST AMENDMENT FORBIDS THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FROM TAKING JURISDICTION OVER THE RELIGIOUS ACTIVITIES OF CHURCHES. 16

CONCLUSION AND PRAYER 21

CERTIFICATE OF SERVICE 22

TABLE OF CONTENTS (Continued)

Page

APPENDIX:

A. Opinion of the United States District Court for the Northern District of Texas, Fort Worth Division A-1

B. Opinion of the United States Court of Appeals for the Fifth Circuit A-16

Order Denying Rehearing by Fifth Circuit Court of Appeals A-37

C. Sections 701(a)-(b), 702, 703(e) and 709(c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (Title VII) A-39

D. Title 29 C.F.R. §1602.47, a regulation promulgated by the Equal Employment Opportunity Commission A-43

TABLE OF AUTHORITIES

Page

CASES:

Brown v. Dade Christian Schools, 556 F.2d 310 (5th Cir. 1977) .. 7

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 7

EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, ___ U.S. ___ 9

Kedroff v. St. Nicholas Cathedral of The Russian Orthodox Church of North America, 344 U.S. 94, (1952) 8, 19, 20

Lemon v. Kurtzman, 403 U.S. 602, (1971) 7, 8, 11, 19

McClure v. The Salvation Army, 460 F.2d 553 (5th Cir. 1972), cert. denied, 409 U.S. 896 .....7, 9, 10, 13

National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, (1979) 7, 9, 11, 13, 14, 16

Saint Martin Evangelical Lutheran Church and Northwestern Lutheran Academy v. State of South Dakota, ___ U.S. ___ , 101 S.Ct. 2142 ..... 11, 16

The Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696, (1976) 19

Sherbert v. Verner, 374 U.S. 398 (1963) 12

Walz v. Tax Commission, 397 U.S. 664 (1970) 16

Wisconsin v. Yoder, 406 U.S. 205 (1972) 12

U.S. CONSTITUTION:

Amendment 1 ..... passim

STATUTES:

Civil Rights Act of 1964, Title VII, as Amended ..... passim

Section 701(a),(b), 42 U.S.C. 2000e(a)(b) 1, 7

Section 702, 42 USCA 2000e-1 ..... 1, 14

Section 703(e), 42 USCA 2000e-2(e) 1, 14, 15

Section 705, 42 USCA 2000e-4 5

Section 709(c), 42 USCA 2000e-8(c) 1, 2, 6, 11

Judiciary and Judicial Procedure, Title 28 USCA §1254 1

TABLE OF AUTHORITIES (Continued)

Page

REGULATIONS:

Equal Employment Opportunity Committee Reporting and Recordkeeping Procedural Rules, 29 CFR 1602.47 ..... 2, 7

Legislative History of the Equal Employment Opportunity Act of 1972 ..... 14, 15

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, is reported at 485 F. Supp. 255 (N.D.Tex. 1980) and is attached to this petition as Appendix A. The opinion of the United States Court of Appeals for the Fifth Circuit, attached as Appendix B, is reported at ~~659~~ 651 F.2d ~~1075~~ 217 (5th Cir.), *rehearing denied*, 659 F.2d 1075 (5th Cir. 1981).

GROUNDS FOR JURISDICTION

The judgment of the Fifth Circuit was entered on July 17, 1981. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on August 14, 1981, and was denied by the Fifth Circuit in an order dated September 16, 1981 (included in Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

A. The First Amendment to the Constitution of the United States (First Amendment) provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

B. Sections 701(a)-(b), 702, 703(e) and 709(c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 ("Title VII"), are set forth in Appendix C.

C. Title 29 C.F.R. § 1602.47, a regulation promulgated by the Equal Employment Opportunity Commission (the "EEOC"), is set forth in Appendix D.

STATEMENT OF THE CASE

(a) SUMMARY

In May 1977, the EEOC filed suit against the Seminary and alleged that the Seminary was subject to the jurisdiction of the EEOC and that the Seminary had refused to file with the EEOC "the Higher Education Staff Information (EEO-6) Report as required by §709(c) of Title VII, contending that Congress did not intend that Title VII extend into the wholly religious activities of the church and that it was protected from the jurisdiction of Title VII by the religion clauses of the First Amendment. Since only employers subject to Title VII can be required to file reports (§709(c)) the issue raised by the EEOC's complaint was whether the Seminary is subject to Title VII and hence to the EEOC's jurisdiction.

The district court (Eldon B. Mahon, J.) held that the Seminary was not subject to the jurisdiction of the EEOC and refused to compel the Seminary to file the EEO-6 report. On appeal, the Fifth Circuit reversed in part, holding that while the faculty and teaching related administrators were exempt from Title VII, the Seminary must file the EEO-6 report with respect to its non-academic administrators and support staff and that, to this extent, the Seminary was subject to the jurisdiction of the EEOC.

There are no disputed facts in this case, which turns solely on questions of constitutional and statutory construction.

(b) PARTIES

The Seminary is a non-profit corporation organized under the laws of Texas, located in Fort Worth, Texas, and owned, operated and controlled by the Southern Baptist Convention (Convention), a voluntary association of Southern Baptist churches. (651 F.2d at 279) As the Fifth Circuit found, "clearly the Seminary is an integral part of a church, essential to the paramount function of training ministers who will continue the faith. . . [and] it is entitled to the status of 'church'" (*Id.* at 283).

The Seminary offers degrees only in theology, religious education, and church music; its curriculum is limited to sectarian education and the Convention does not allow the Seminary to charge tuition. (*Id.* at 279) Fulfillment of the academic requirements of a degree does not automatically entitle a candidate to the award of a degree. The faculty reserves the right to withhold a degree based on moral or spiritual deficiencies. (~~258~~485 F.Supp. at 258)

Each applicant for admission to the Seminary must represent that he or she has received a divine call to full-time Christian ministry and if married, the spouse must express a conviction of the candidate's "call" as well as the spouse's own commitment. The local church of which the candidate is a member must verify the student's or couple's divine call and commitment to the Christian faith, integrity and other qualifications. (*Id.* at 279, 485 F.Supp. at 258). As the Fifth Circuit found, "Thus no matter how superior one's academic ability is, religious commitment is the quality that determines admission."

With respect to the personnel of the Seminary the Trial Court found and the Fifth Circuit concurred that "[m]embers of the faculty and administration of [the]

Seminary are considered ministers and are hired, assigned, advanced, tenured, evaluated and terminated on predominately religious criteria" and their recruitment "is viewed as a divinely guided 'spiritual quest' mutually pursued by the Seminary and the prospective employee" and that the support personnel "perform a bona fide religious and educational function." (651 F.2d at 280, quoting from 485 F.Supp. at 258, 259).

The Fifth Circuit then found:

> "Since ninety-five percent of these positions are filled by students and spouses of students and faculty, there is a built-in qualification for most of the support personnel. Undisputed testimony reveals that the remaining twenty-two full'time support personnel must be compatible with the 'Seminary family,' and must display an appreciation for and participation in the mission of the Seminary." (651 F.2d at 280)

As to all employment decisions relating to all of the Seminary's personnel, regardless of task, the Fifth Circuit concluded:

> "In sum, as found by the district court, the 'Seminary regards its employment decisions as divinely guided assessments of each employee's suitability for the position he will occupy in relation to the student and as a representative of the institution . . ." (*Id.* at 280, quoting from 285 F.Supp. at 259).

As found by the Trial Court the "full-time career support personnel have considerable contact with students and their families as supervisors and as providers of student services. . . [and] they are encouraged and expected to view their work as fulfillment of a religious calling. A significant number of them have theological degrees or

have performed other full-time missionary work." (485 F.Supp. at 259).

The importance of the religious criteria used by the Seminary in selecting students, faculty, administrators and support staff in maintaining a "pervasively religious environment" is underlined in the District Court's finding:

> "It cannot be overemphasized that the Seminary views a pervasively religious environment as essential to the cultivation of the distinct attitudes and qualities of Baptist ministers and this view dictates its employment practices as a whole. Employees are not merely hired to perform a task, but must from first to last be willing members of the ecclesia." (485 F.Supp. at 258)

The absolutely critical fact in this case, found by the District Court and accepted by the Fifth Circuit is that the Seminary regards each employment decision, whether for a faculty member or a non-academic support staff, as divinely guided.

The EEOC is an agency of the Federal Government, created under Title VII of the Civil Rights Act of 1964 (See §705 of Title VII, 42 USC §2000e-4).

(c) THE JURISDICTION OF THE EEOC AND THE EEO-6 REPORT

In its complaint filed in May 1977 the EEOC asked the district court to order the Seminary to file the Higher Education Staff Information Report EEO-6, which is a complex form requiring information regarding every employee of an institution of higher education.

The EEOC's authority to require the filing of the EEO-6 report is based on § 709(c) of Title VII, which provides in part as follows:

> (c) *Every employer . . . subject to this subchapter* shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as *reasonable, necessary, or appropriate for the enforcement of this subchapter* or the regulations or orders thereunder. (emphasis added.)

Under this statute, the EEOC may require the filing of reports (such as the EEO-6) *only* from employers "subject to this subchapter" (that is, Title VII) and only for the purpose of *enforcing* the anti-discrimination prohibitions of Title VII.

Thus, the significant question in this case is not whether a report should be filed or not, but whether churches, such as the Seminary, are subject to Title VII and the jurisdiction of the EEOC.

(d) THE DISTRICT COURT'S DECISION

The District Court held that application of Title VII to any aspect of the employment relationship between the Seminary and its faculty, administrators and support staff would violate the religion clauses of the First Amendment and, accordingly, refused to compel the Seminary to file the EEO-6 Form.

The District Court began by noting that the "literal language" of Title VII covers the Seminary, because it employs more than fifteen persons, that its activities

affect interstate commerce, and that it is an educational institution granting degrees in college level instruction, citing 42 USC §2000e and 29 C.F.R. §1602.47. (485 F.Supp. at 259)

The Court then, without independent inquiry as to Congressional intent, announced:

> "The Court is bound by the law announced in this Circuit in *McClure* [*v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972), cert. denied, 409 U.S. 896 *(McClure)*] . . . that Congress did not intend to exempt any religious organization, whether a church or a seminary," from the jurisdiction of Title VII. (*Id.* at 260)

The District Court then turned to the constitutional (First Amendment) question, holding that "a seminary's function within a particular religion is to replenish the core of faithful who provide its structure, a role even more essential to its mission than that served by parochial, elementary and secondary schools, e.g., *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) *(Catholic Bishop)*; *Lemon v. Kurtzman*, 408 U.S. 602; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 767 (1973); *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), and one qualitatively different from that of religiously affiliated colleges offering liberal arts or other secular courses of study to the public . . . The "seminary is an ultimate religious activity entitled to the highest degree of First Amendment protection." (*Id.* at 260).

Based upon such findings the Court held that "[a]pplication of the provisions of Title VII to any aspect of the employment relationship existing between the Seminary and its faculty and administrators, by virtue of

their status as ministers . . . [and] to any aspect of the peculiar employment relationship existing between the Seminary and its support personnel . . . infringes upon the free exercise clause of the first amendment," (*Id.* at 260). As to the Seminary's support staff the District Court found:

> "Although these employees are not ministers in the same formal sense as faculty, the Seminary has chosen not without cost to impose religious responsibilities on their role that go beyond objective employment duties and skills and beyond simple church membership." (*Id.* at 260)

The District Court concluded its discussion of the constitutional question by holding further that the application of the provisions of Title VII to the employment decisions of the Seminary would result in excessive governmental entanglement, stating:

> "The Seminary, however, has attempted to create a virtually cloistral environment through manifest, institutional devices, of which its employment practices are an essential part. Its employment decisions, steeped in a perception of divine will and inseparable from its mission, become matters of religious prerogative and warrant the fullest protection from governmental supervision. Enforcement of Title VII claims against a seminary based on race, sex, or national origin, even in the absence of articulated doctrinal compulsion, will lead inevitably to *excessive governmental entanglement* with religion in the process of dissecting employment functions into religious and secular components and in divining the good faith and legitimacy of religious grounds asserted as a defense to a prima facie case of discrimination." Citing, among other decisions, *Lemon*, 403 U.S. 602, 613, 615-16 (1971); and *Kedroff*

v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) *(Kedroff)* (*Id.* at 260, emphasis added)

(e) THE FIFTH CIRCUIT'S DECISION

The Fifth Circuit reversed the judgment of the District Court in part and remanded its entry of judgment consistent with its opinion. (651 F.2d at 287)

As to the question of statutory construction the Fifth Circuit held that because "After both the announcement of *Catholic Bishop* and the filing of the Seminary's brief, this court has reaffirmed *McClure's* validity. *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980),. . . This holding of *McClure may not be reexamined* by this panel." (651 F.2d at 282, emphasis added).

The Court then proceeded to consider the constitutional considerations. The Court held that "the Seminary is an integral part of a church, essential to the paramount function of training ministers who will continue the faith . . . [and] *is entitled to the status of 'church'*." (*Id.* at 283, emphasis added)

"Based upon the district court findings of fact," the Fifth Circuit concluded, "that the faculty at the Seminary fit the definition of 'ministers' for the purpose of applying *McClure*" (*Id.* at 283). The definition of "minister" for the purpose of *McClure* is not clear in that the Court pointed out that its analysis in *McClure* was complicated by the fact that Mrs. McClure, though an ordained minister, was functioning principally as a secretary at the time she was discharged. The Court then explained that the failure of any party to challenge her 'status as a minister' . . . relieved this court from clearly explicating the test for such a determination in that case." (*Id.* at 284). From the discussion by the Court fol-

lowing the portion just quoted concerning *McClure*, it appears that the Fifth Circuit based its classification of Mrs. McClure as a "minister" solely upon Mrs. McClure's status as an "ordained minister, a commissioned officer in the Salvation Army" without regard to the task assigned. (*Id.* at 284)

Although the Fifth Circuit accepted the district court's findings of fact, and specifically agreed with the district court's finding that the "Seminary regards its employment decisions as divinely guided assessments of each employee's suitability," (*Id.* at 280), it nonetheless held that the Seminary's nonacademic administrators and support staff were not "ministers" for the purposes of *McClure* and were subject to the EEOC's jurisdiction under Title VII (*Id.* at 285).

The Court explained that, irrespective of the acceptance of the district court's findings of fact, "the status of these employees as ministers for the purposes of *McClure* remains a legal conclusion subject to plenary review . . . [and] while religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." (*Id.* at 283)

In remanding the case to the district court the Fifth Circuit instructed:

> "In the absence of exact job descriptions of all positions on the administrative staff, we are unable to be precise as to the category of all personnel. Should the parties be unable to agree as to whether any particular administrative staff position is traditionally ecclesiastical or ministerial, the resolution of the dispute may be referred to the district court." (*Id.* at 285)

Finally, the court made a "second look" at the constitutional issues under the heading "First Amendment Questions." (*Id.* at 285) It reviewed the mandate of *St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy v. South Dakota*, ___U.S. ___, 101 S.Ct. 2142 (1981) *(St. Martin)* and *Catholic Bishop* that "if the interpretation complained of 'presents a significant risk that the First Amendment will be infringed,' any ambiguity in the statute is construed in a matter to avoid such constitutional problems." (651 F.2d at 285).

However, such "second look" by the Fifth Circuit did not meet the basic issue of this case — the jurisdiction of the regulatory agency over a wholly religious activity of the church. Rather, "significant risk" was determined by the court in the context of a "wholly sectarian" (*Id.* at 286) activity being required by a regulatory agency to furnish "not so vital" (*Id.* at 287) information which was not to be used "to monitor compliance with Title VII" (*Id.* at 286) concerning non-minister empioyees. (The Fifth Circuit did not discuss §709(c) of Title VII, which authorizes the EEOC to require reports *only* for the purpose of enforcing Title VII.)

In such context, the Court held that the risk of entanglement as between the Seminary and the government was "minimal" (*Id.* at 286) and accordingly did not violate the establishment clause under *Lemon*.

The Court then concluded that since only "not so vital," "non-compliance" information as to non-ministers is required and "the EEOC's direct 'objective' *could be said to be* surveying employment in institutions of higher learning, not eliminating discrimination . . . the scale is not heavily tipped in either direction." (*Id.* at 287). Nevertheless, the Court held that under the test applicable to the personal religious belief fact situations as the

Court announced in *Wisconsin v. Yoder*, 406 U.S. 205, and *Sherbert v. Verner*, 374 U.S. 398, the requirement of filing form EEO-6 by the Seminary as to those "not ministers" did not violate the free exercise clause of the First Amendment.

REASONS FOR GRANTING THE WRIT

The issue presented here is an uncommonly important question of federal law governing fundamental rights under the religion clauses of the First Amendment. If the decision below is allowed to stand, every church congregation and its wholly religious mission and activities with 15 or more employees will be brought under the surveillance and monitoring of the EEOC. In construing the statute as authorizing this result, the Fifth Circuit has used a method of statutory construction contrary to what is required by decisions of this Court. In holding that a statute providing for such a continuing involvement between EEOC and a church would be constitutional, the Fifth Circuit has reached a result that either is in conflict with applicable decisions of this Court or that presents an important question that should be settled by this Court.

A. Title VII of the Civil Rights Act of 1964 Does Not Authorize the Equal Employment Opportunity Commission to Take Jurisdiction Over the Religious Activities of Churches.

If Congress did not intend that Title VII of the Civil Rights Act of 1964, as amended in 1972, should reach a church and its wholly religious activities, such as petitioner, the case should be decided on that ground in order to avoid reaching constitutional questions. The Fifth Circuit held that it was bound on the statutory construction issue (651 F.2d at 282), by the earlier decision of a panel

of that court in *McClure* (460 F.2d at 558), that Congress did not intend to exempt religious organizations, including the church, from Title VII.[1]

Subsequent to *McClure*, however, this Court decided *Catholic Bishop*. The holding in *Catholic Bishop* is that in the "absence of an 'affirmative intention of the Congress clearly expressed,'" this Court would not construe a statute "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." (440 U.S. at 506-507). If the method of construction announced in *Catholic Bishop* had been employed below, there would have been no need for the Fifth Circuit even to reach the constitutional issue.

The critical facts recognized by the Fifth Circuit are that the Seminary is an integral part of the church, entitled to the status of a church (651 F.2d at 283) and in carrying out its wholly religious mission "regards its employment decisions as divinely guided," (*Id.* at 280). Under such facts, the very process mandated by the Fifth Circuit that the Seminary and the EEOC divine which employees come under the ambiguous test of "minister," together with the continuing conflict between the spiritual criteria of the Seminary as to all of its personnel and the secular standard and rules of the EEOC, patently presents the inevitable and significant risk of First Amendment infringement of which *Catholic Bishop* speaks (440 U.S. at 502).

[1]Note that the rule of statutory construction announced in *McClure* by the Fifth Circuit requires a clear showing of Congressional intent *to exclude* a religious activity from the Act, while the rule mandated in *Catholic Bishop* by the Supreme Court requires an affirmative Congressional intent, clearly expressed, to *include* such religious activity under the Act.

Both the text of Title VII and the legislative history of the Equal Employment Opportunity Act Amendments of 1972 show that Congress did not have an affirmative intention clearly expressed that E.E.O.C. be granted jurisdiction over a church or its wholly religious activities. Title VII is silent as to a church. Section 702 (42 U.S.C. §2000e-1) and Section 703(e) (42 U.S.C. § 2000e-2(e)) were obviously designed to accommodate religiously affiliated institutions in employing individuals of a particular religion, such as permitting a Methodist hospital to employ a Methodist chaplain or a Roman Catholic school to employ personnel of that faith. These exemptions were not designed to cover, nor do they mention, a church.

The debate in the House of Representatives, the committee reports in both Houses, and the conference committee reports are also silent about the application of the Act to a church and its wholly religious activities. The only debate relating to this issue was in the Senate in connection with an amendment offered by Senators Ervin and Allen to Section 702 (Amendment No. 615), which proposed a broad exemption from Title VII for *all* educational institutions and religious corporations, associations, and societies.

The discussion by the sponsors of Title VII in opposition to the Ervin-Allen amendment was all of the enormity of the educational exemption and the unfairness of exempting religiously affiliated institutions, such as hospitals, that serve the public and are in competition with secular private and public institutions. This discussion was quite similar to the debate in Congress on an exemption of religious organizations under the National Labor Relations Act, which this Court examined in *Catholic Bishop*, (440 U.S. at 504-506). For example, as to the

broad Ervin-Allen Amendment, Senator Javits emphasized the breadth of the educational exception, pointing out that some 4,300,000 employees were engaged in education. (*Legislative History of the Equal Employment Act of 1972*, November 1972, p. 1254.)

As a part of Senator Ervin's arguments for exempting all religious and educational institutions, he called attention to the fact that his amendment would likewise exempt churches, and said: "For the life of me, I cannot comprehend why the EEOC and those who are championing the cause are so greedy for power that they want to lay the political hands of Caesar on the employment practices of churches of God." (*Id.* at 1227.)

The bill's floor leader, Senator Williams, gave these significant assurances in response to Senator Ervin:

> "It is clearly in the law that, *where the question is religion*, this legislation does not apply.* * *
>
> "I must say that it seems to me that, for good reason, we are perhaps building on the spirit of the First Amendment, *that the government should not be involved in religious activities.* * *
>
> "Therefore, where we are saying that nobody should be discriminated against in employment, *we will not carry that into an area where we have religious activities.*" (*Id.* at 1228, 1229, emphasis added. See also p. 1250.)

Neither the limited exemption of §703(e), nor the rejection of the blanket exemption for all educational and religious organizations under the Ervin-Allen amendment shows a clearly expressed affirmative intention to apply Title VII to the wholly religious activities of churches. The above assurances by Senator Williams to

the Senate, if not clearly supporting, at least create an obvious ambiguity as to Congressional intent.

With the attendant significant risk of First Amendment infringement and in the absence of an affirmative intention of the Congress, clearly expressed, to apply Title VII to the church and its wholly religious activities, the decision below holding the statute applicable is in direct conflict with the rule of construction declared by this Court in *Catholic Bishop* and reaffirmed in *St. Martin* (101 S.Ct. at 2151).

B. The Religion Clauses of the First Amendment Forbid the Equal Employment Opportunity Commission From Taking Jurisdiction Over the Religious Activities of Churches.

In *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970), this Court announced that to survive scrutiny under the Religion Clauses of the First Amendment, a statute must not foster "an excessive government entanglement with religion." Many cases since 1970 have reiterated that requirement. The decision below is in conflict with those decisions. It does so by allowing a federal regulatory agency to investigate and become involved in personnel decisions that are of paramount ecclesiastical concern to the Seminary and constitute the most sensitive area in its governance and operation and it does so also by subjecting to continuing discussion between the Seminary and government the question of which of the Seminary's employees are "ministers."

The Fifth Circuit held that the Seminary is "entitled to the status of 'church' " (651 F.2d at 283) It held also that the faculty of the Seminary, and top-level administrators who equate to or supervise faculty, should be considered "ministers" and exempt from the Act. (651 F.2d

at 283-285) Other administrators, however, whose positions "are akin to support staff positions" and who "perform tasks which are not traditionally ecclesiastical or religious," are not exempt. "Should the parties be unable to agree as to whether any particular administrative staff position is traditionally ecclesiastical or ministerial, the resolution of the dispute may be referred to the district court." (651 F.2d at 277)

The Seminary's concept of the term "minister" is in the spiritual sense of those who are committed to and serve in carrying out the Seminary's divine mission. It requires this commitment and participation of all of its personnel. It is undisputed that the Seminary applies a criterion for all staff based upon that adopted by and applicable to the faculty. That criterion puts one's commitment to the mission of the Seminary above skill. The Seminary considers its employment decisions about its non-teaching staff to be based on its perception of divine will and to be inseparable from its mission. The resolution of any dispute between the Seminary and the EEOC (whose criterion is strictly secular) about the Seminary's employment and personnel criteria and decisions (which are primarily and foremost religious) will, in the language of *Catholic Bishop*, "necessarily involve inquiry into the good faith of the positions asserted by the clergy-administrators and its relationship to the school's religious mission." (440 U.S. at 502) Under the decision below, the district court is made the final arbiter of who is or is not a "minister."

The trial court in this case recognized that "the risk of unseemly governmental entanglement increases exponentially as the function of an institution becomes more fundamentally and pervasively religious." (485 F.Supp. at 260)

This case is unlike those which many courts have previously considered, in which churches have become affiliated with enterprises that serve the public in competition with predominantly secular institutions, such as hospitals, schools, colleges, publishing houses, and the like. This case relates to a wholly religious activity of the church itself, an activity that serves only the churches and does not compete in the public marketplace.

To the district court "[t]he operation of a seminary is an ultimate religious activity entitled to the highest degree of first amendment protection." (485 F.Supp. at 260) The Fifth Circuit, though reaching an erroneous result, recognized the same thing.

> "Clearly, the Seminary is an integral part of a church, essential to the paramount function of training ministers who will continue the faith. It is not intended to foster social or secular programs that may entertain the faithful or evangelize the unbelieving. Its purpose is to indoctrinate those who already believe, who have received a divine call, and who have expressed an intent to enter full-time ministry." (651 F.2d at 283.)

Despite this recognition of the wholly religious character of the Seminary, the Fifth Circuit's decision authorizes the EEOC to engage in and become a part of the employment decision process of the Seminary relating to all personnel except "ministers." Although the initial encounter will merely apply to those to be listed on Form EEO-6, the long-term and chilling effect of the decision is that it establishes a continuing jurisdiction over the Seminary by a federal regulatory agency. The governance of the Seminary is to be subjected to federal scrutiny. Its financial and personnel records are made subject to audit. Its judgment in the selection and promotion of

personnel, and the assignment of tasks to them, are opened to question. It is required to adopt the voluminous and technical secular procedures relating to the establishment of records, employment applications, interviews, criteria for employment, and the like. Such broad and limitless involvement is the very essence of entanglement. "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches." *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971).

Heretofore, the Seminary has maintained, as part of its spiritual quest for all personnel, an inflexible criterion that a declared personal spiritual commitment to the wholly religious mission of the Seminary is paramount to educational, professional, and vocational skills, and even paramount to Baptist denominational affiliation. It has been of the very essence of the governance and administration of the Seminary that spiritual employment criteria are applied to all employees. The Constitution reflects "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* (344 U.S. at 116). See also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721-722 (1976).

The decision would take away from those charged with governance of the Seminary the "power to decide for themselves." The investigations, surveillance, and involvement of EEOC in the employment decisions of the Seminary and the district court acting as final arbiter

of differences between the clergy-administrators and the government agency is not only a constitutionally impermissible entanglement in the governance of the Seminary, but also an impermissible violation of the free exercise doctrine enunciated in *Kedroff*.

CONCLUSION

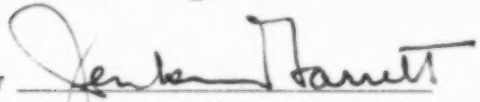
For the reasons stated in this petition, Southwestern Baptist Theological Seminary respectfully requests this Court to grant the writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision below.

Respectfully submitted,

JENKINS GARRETT
STEVE M. KING
GARRETT & STAHALA
1705 Commerce Building
Fort Worth, Texas 76102
(817) 332-8484

FRANK D. McCOWN
1705 Commerce Building
Fort Worth, Texas 76102
(817) 335-8080

GRIFFIN B. BELL
JAMES D. MILLER
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

By 
Jenkins Garrett

Attorneys for Petitioner

Of Counsel:

Charles Alan Wright
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

CERTIFICATE OF SERVICE

A copy of the foregoing petition for Writ of Certiorari has been deposited in the United States Post Office, first class mail, prepaid, addressed to all counsel of record at their post office addresses this 14th day of December, 1981.

Jenkins Garrett

Appendix

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY.

Civ. A. No. CA 4-77-141-E.

United States District Court,
N. D. Texas,
Fort Worth Division.

Jan. 18, 1980.

The Equal Employment Opportunity Commission brought action to establish juridsiction over theological seminary under Title VII of the Civil Rights Act of 1964. The District Court, Mahon, J., held that: (1) application of the provisions of Title VII to any aspect of employment relationship existing between seminary and its faculty and administrators, by virtue of their status as ministers, would infringe on the free exercise clause of the Firrst Amendment; (2) application of the provisions of the Title VII to any aspect of peculiar employment relationship existing between seminary and its support personnel would also infringe on the free exercise clause, though such employees were not ministers in the same formal sense as the faculty, where seminary had chosen to impose religious responsibilities on the role of such employees which went beyond objective employment duties and skills and beyond simple church membership, and had attempted to create a virtually cloistral environ-

ment through manifest institutional devices of which its employment practices were an essential part, and thus seminary could not be required to submit higher education staff information report to the EEOC even though the seminary was covered under the jurisdictional language of Title VII; and (3) seminary's acceptance of veterans receiving federal assistance and the accompanying enforcement procedures of Title VI did waive seminary's First Amendment objectives to the more comprehensive and intrusive enforcement possible under Title VII.

Dismissed.

MEMORANDUM OPINION AND ORDER

MAHON, District Judge.

This action is brought by the Equal Employment Opportunity Commission ("EEOC") to establish jurisdiction over the defendant Southwestern Baptist Theological Seminary ("Seminary") under § 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; and specifically, to compel the Seminary to submit the Higher Education Staff Information Report ("EEO-6"). 29 C.F.R. § 1602. The Seminary admits that it is covered under the jurisdictional language of § 709(c) and the literal wording of EEOC regulations pertaining to educational institutions. 29 C.F.R. § 1602.47. However, the Seminary has refused to submit form EEO-6 for the years 1975 and 1977 contending that it is protected from enforcement of Title VII by the religious clauses of the first amendment to the Constitution of the United States.

Plaintiff denies that Title VII infringes on any first amendment rights and asserts further that the Seminary has submitted to the virtually identical enforcement pro-

cedures of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq., in seeking and maintaining its status as an approved program of education for veterans receiving educational benefits and has thereby waived its free exercise objections, if any, to enforcement of Title VII.

I. *Free Exercise*

The Southern Baptist Convention (the "Convention") is a voluntary association of Southern Baptist churches composed of representatives ("messengers") elected by cooperating churches. The convention is incorporated in the State of Georgia "for the purpose of eliciting, combining and directing the energies of the Baptist denomination of Christians for the propagation of the gospel." Defendant Southwestern Baptist Theological Seminary (the "Seminary") is an agency of the Convention located in Fort Worth, Tarrant County, Texas, and is organized as a Texas non-profit corporation for the specific purpose of training ministers for the Southern Baptist churches and missions.

The Seminary is exempt from income taxes and as an integrated auxiliary of an association of churches is not required to file the Form 990 information return. Sixty percent of the Seminary's funding comes from the Convention's missionary fund, 20% from endowment, 20% from private contributions and student charges. In addition to its strictly educational facilities, the Seminary operates a cafeteria, a printshop, a bookstore and some off-campus student housing. These are conducted under various financial arrangements as student and/or administrative services and not as profit-making ventures.

Approximately 1,450 theological candidates, most of whom have other secular degrees, are enrolled in the Seminary pursuing degrees exclusively in theology, reli-

gious education, and church music. The Seminary's bylaws flatly prohibit the expansion of curriculum to provide strictly secular education. Enrollment is not open to the public or to Baptists in general but is limited to persons who have experienced a "divine call" to a specific role in the ministry or the church. Certain academic standards are imposed, but these are considered subordinate to moral and spiritual qualifications. A prospective student must persuade the Seminary not only of his own personal spiritual experience and commitment to a full-time Christian vocation but, if married, of his spouse's commitment as well. The local church must verify the student's, or couple's, divine call, character, and other qualifications.

Fulfillment of the academic requirements of a degree program does not automatically entitle the theological candidate to award of a degree. The faculty reserves the right to withhold a degree based on moral or spiritual deficiencies, and has exercised this right in the past. Upon graduation, the students are left to their own efforts, aided by divine providence, in locating the particular position of service they will occupy. The Seminary does not operate a placement service or an employment office to aid its graduates. Information is merely supplied to churches that request it.

It cannot be overemphasized that the Seminary views a pervasively religious environment as essential to the cultivation of the distinct attitudes and qualities of Baptist ministers and that this view dictates its employment practices as a whole. Employees are not merely hired to perform a task, but must from first to last be willing members of the ecclesia. Religious exercise is a virtual condition of employment. Brief devotional services open all staff meetings, and chapel services which employees

as well as students are expected to attend are conducted each school day, Tuesday through Friday. The Seminary's employment practices are designed to create an integrated, homogeneous community exemplifying the mores and dogma of the Baptist faith and the quality of religious life achieved by its strictest application. Since all employees, whatever their position, are expected to contribute to a unified religious endeavor and maintain a commitment to spiritual life, religious discipline extends far into their personal lives, not merely to avoid the embarrassment of a notorious lifestyle, but to immerse the students in an atmosphere of intense piety and to provide a model of religious practice to the outside world.[1]

The significance of faculty and administrators in this scheme cannot be doubted. "The ministry" of the Baptist church spans a range of religious vocations which may be characterized as full-time Christian service in response to a divine call and includes lay leaders as well as ordained ministers. Lay leaders may "serve a ministry" as directors of religious education, or music directors of a local church, or as professionals attached to a foreign mission. Members of the faculty and administration of a seminary are considered ministers and are hired, assigned, advanced, tenured, evaluated and terminated on predominately religious criteria. Personal characteristics that evince dedication to Baptist ideals and faithful participation in the activities of the church of which the

[1]The Seminary employs 633 individuals, 189 in full-time and 433 in part-time positions. Of the 162 faculty members, 86 are full time and 76 are part-time. The administrative staff consists of 15 full-time, permanent positions, including deans. There are 21 permanent, full-time support positions consisting of clerical, maintenance and medical staff. Sixty-seven temporary support positions are presently filled by spouses of students or faculty members. The 386 part-time support positions are occupied exclusively by students, student's spouses and faculty spouses.

employee is a member carry equal or greater weight than academic qualifications or scholarship. Recruitment of faculty and administrators is viewed as a divinely guided "spiritual quest" mutually pursued by the Seminary and the prospective employee. No employment agencies, search organizations, or newspaper ads are utilized in seeking faculty or administrators. Membership in the Baptist church is a prerequisite to employment.

Support personnel likewise perform a bona fide religious and educational function. The Seminary hires students, students' spouses and faculty spouses in preference to outsiders. These employees comprise the great majority of the Seminary's support personnel and all of its part-time employees. This practice extends financial assistance to the students and helps to draw the students, the faculty and their families into a religious community.

Full-time, career support personnel have considerable contact with students and their families as supervisors and as providers of student services. Unlike faculty and administrators, they are not ministers in the formal sense by virtue of their employment at the Seminary. However, they are encouraged and expected to view their work as fulfillment of a religious calling. A significant number of them have theological degrees or have performed other full-time missionary work. Although membership in the Baptist Church is not a formal requirement for employment as support personnel, these employees must display an appreciation and enthusiasm for the evangelical principles of the Seminary as a Baptist institution. In the judgment of Dr. Russell Dilday, Jr., President of the Seminary, only a person from a very similar fundamentalist background could have acquired

the sympathetic understanding to make them compatible with "the Seminary family." No degree of skill or expertise could override the conviction that a person occupying a support position evinced an attitude inconsistent with the ideals and religious responsibilities of the institution.

The issues presented in this case cannot be resolved by balancing the compelling interests of the state against the sanctity of irreconcilable religious belief, as in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Although the Seminary recognizes certain doctrines that could require discrimination on the basis of sex in some faculty and administrative positions at some remote future date, its representatives deny the existence of any tenet of the Baptist faith that would require or justify discrimination solely on the basis of race or national origin as a matter of religious conviction. Nevertheless, it is clear that the Seminary intends to select and advance employees of every category on criteria that go beyond church affiliation and possession of basic training and skills. The Seminary regards its employment decisions as divinely guided assessments of each employee's suitability for the position he will occupy in relation to the students and as a representative of the institution, and seeks to assert its right to make these intensely subjective decisions without government supervision. The case presents a pure question of entanglement that cannot be obviated by statutory construction in the manner of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), i.e., whether the religious exception contained in Title VII of the Civil Rights Act is adequate when applied to a seminary to assure the degree of separation between

church and state required by the free exercise clause of the first amendment.

Jurisdiction under the literal language of Title VII is conceded. The Seminary admits that it employs more than 15 persons, that its activities affect interstate commerce, and that it is an educational institution granting degrees in college level instruction. 42 U.S.C. § 2000e; 29 C.F.R. § 1602.47. The Court will further assume that it is not an unlawful employment practice under Title VII, 42 U.S.C § 2000e-2(e) for the Seminary to restrict its employment to persons of the Baptist denomination or of other closely related fundamentalist sects.

[1] This Court is bound by the law announced in this circuit in *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), *cert. denied* 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1973), that Congress did not intend to exempt any religious organization, whether a church or a seminary, from liability for discriminating against its employees on the basis of race, sex, or national origin. The exemption presently afforded by Title VII, 42 U.S.C. § 2000e-1, is a remarkably clumsy accommodation of religious freedom with the compelling interests of the state, providing on the one hand far too broad a shield for the secular activities of religiously affiliated entities with not the remotest claim to first amendment protection while on the other hand permitting intrusions into wholly religious functions. *See McClure, supra; King's Garden, Inc. v. F.C.C.*, 162 U.S.App.D.C. 100, 104, 498 F.2d 51, 56 (D.C.Cir. 1974). The exemption covers only religious discrimination and is intended to suffice for a wide range of diverse religious entities from church supported hospitals, publishers of religious literature, and religiously affiliated colleges to the churches themselves, their seminaries and auxiliaries. It makes no

accommodation for the entanglement that may result from the mere inquiry into the employment practices of an institution that comprises the very heart of religious propagation.

[2] The risk of unseemly governmental entanglement increases exponentially as the function of an institution becomes more fundamentally and pervasively religious. The originative power of any religion lies in the institution that schools its ministers, preserving and transmitting dogma in a pure form in the academic sense and endeavoring to animate sterile doctrine into communicable faith. A seminary's function within a particular religion is to replenish the core of faithful who provide its structure, a role even more essential to its mission than that served by parochial elementary and secondary schools, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 767, 93 S.Ct. 2955, 2962, 37 L.Ed.2d 948 (1973); *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir, 1977), and one qualitatively different than that of religiously affiliated colleges offering liberal arts or other secular courses of study to the public, *see e.g., Bob Jones University v. Johnson*, 396 F.Supp. 597 (D.S.C.1974) *affd. per curiam*, 529 F.2d 514 (4th Cir. 1975); *EEOC v. Mississippi College*, 451 F.Supp. 564 (S.D.Miss.1978) *appeal docketed*, No. 78-3123 (5th Cir. Sept. 27, 1978). The operation of a seminary is an ultimate religious activity entitled to the highest degree of first amendment protection.

[3] Application of the provisions of Title VII to any aspect of the employment relationship existing between the Seminary and its faculty and administrators, by vir-

tue of their status as ministers, infringes upon the free exercise clause of the first amendment. *McClure, supra; EEOC v. Mississippi College*, 451 F.Supp. 564 (S.D.Miss.1978) *appeal docketed*, No. 78-3123 (5th Cir. Sept. 27, 1978).

[4, 5] Application of the provisions of Title VII to any aspect of the peculiar employment relationship existing between the Seminary and its support personnel also infringes upon the free exercise clause of the first amendment. Although these employees are not ministers in the same formal sense as faculty, the Seminary has chosen not without cost to impose religious responsibilities on their role that go beyond objective employment duties and skills and beyond simple church membership. The Seminary will necessarily and rightfully discriminate among Baptists in selecting a zealous, orthodox, and spiritually compatible staff and in determining the terms and conditions of their employment. A school of divinity operated as an adjunct to a large secular institution, sharing its physical space and utilizing its administrative services and personnel, would be hard pressed to convince this Court that the orthodoxy of its non-teaching staff was necessary to discipline its students in the daily practice of a religious life. The Seminary, however, has attempted to create a virtually cloistral environment through manifest, institutional devices, of which its employment practices are an essential part. Its employment decisions, steeped in a perception of divine will and inseparable from its mission, become matters of religious prerogative and warrant the fullest protection from gov-

ernmental supervision.[2] Enforcement of Title VII claims against a seminary based on race, sex, or national origin, even in the absence of articulated doctrinal compulsion, will lead inevitably to excessive governmental entanglement with religion in the process of dissecting employment functions into religious and secular components and in divining the good faith and legitimacy of religious grounds asserted as a defense to a prima facie case of discrimination. *Lemon v. Kurtzman*, 403 U.S. 602, 613, 615-16, 91 S.Ct. 2105, 2111, 2112-13, 29 L.Ed.2d 745 (1971); *McClure, supra; Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

II. *Waiver*

[6] Plaintiff EEOC asserts that the Seminary has waived any first amendment objections to enforcement of Title VII by seeking approval of its course of study under the accreditation standards of the Veterans Administration, 38 C.F.R. § 18, and thereby subjecting itself to enforcement of similar prohibitions contained in Title VI of the same Act. 42 U.S.C. § 2000d. Surveillance of sectarian schools to the extent of assuring minimum educational standards, i.e., for accreditation purposes, has never been considered a major involvement amounting to entanglement. *Pierce v. Society of Sisters*, 286 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1931); *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). In fact, approval of the

[2]This holding would not permit the Seminary to enter into tangential commercial endeavors and claim the same shelter for those activities. However, where the positions sought to be exempted from Title VII are within the scope of functions ordinarily entailed in operating an educational institution it is entitled to treat these employees as part of its religious function.

Seminary's program of education was expressly granted on the strength of the Seminary's accreditation by the American Association of Theological Schools and a routine examination of its catalogue under 38 U.S.C. § 1775(a). *Cf.* 38 U.S.C. § 1776. The Seminary is subject to periodic investigations conducted by the Texas Education Agency to assure that the institution is complying with recordkeeping requirements. These annual spot checks are conducted by representatives of the Veterans Administration and the Texas Education Agency and have consisted of random examinations of the grade sheets of enrolled veterans. In this respect the Seminary has not consented to any infringement of its religious exercise.

[7, 8] The Veterans Administration construes Title VI as applicable to any institution that it approves for enrollment of veterans receiving educational benefits, and accordingly requires compliance with Title VI as a condition to approval. *Bob Jones University v. Johnson*, 396 F.Supp. 597 (D.S.C.1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975) (held, University enrolling veterans is a "recipient of federal funds" under Title VI). Coverage under Title VI of the Civil Rights Act is independent of coverage under Title VII. Title VII applies generally to discrimination in employment by employers affecting interstate commerce, as defined in that title, regardless of whether or not they receive any federal funds. 42 U.S.C. § 2000e(b). Title VI forbids only discrimination by a recipient of federal funds against the participants in (or beneficiaries of) a federally assisted program conducted by the recipient, regardless of whether or not the participant or beneficiary is an employee. 42 U.S.C. § 2000d. Although the relationship between the recipient and the beneficiary may be that of employer/employee

where the primary purpose of the federal program is to provide employment, Title VI would ordinarily apply only to those employees hired under the federally assisted program and not to the recipient's employment practices as to other employees. 42 U.S. § 2000d-3.[3] If Title VII also applies, it will do so by its own terms and not by virtue of the employer's status as a recipient of federal funds under Title VI. There is thus no statutory reason to treat Title VI as a separate avenue to coverage under Title VII.

The EEOC's argument seems primarily to be that the Seminary cannot submit to enforcement of regulations attached to a particular program in order to gain its benefits and then in good faith object on religious grounds to enforcement of identicial or substantially similar regulations under a general welfare statute. This argument has some superficial appeal, but on examination is not supported by the law respecting grants-in-aid programs or by the facts of this case.

[9, 10] The United States has the power to fix the terms upon which federal assistance or subsidies will be awarded, *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947), so long as those terms are themselves constitutional, *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). There is no authority for the proposition that acceptance of the terms attached to one grant subjects the recipient to regulation for all purposes or

[3]Title VI could apply to employees who are not themselves beneficiaries if discrimination against them has a discriminatory effect on the actual beneficiaries. e.g., where a school district's discriminatory policies in employment or assignment of teachers in the public school restricts the educational opportunities of the students. *United States v. Jefferson County Board of Education*, 372 F.2d 836, 881-883 (5th Cir. 1966) *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967); 39 C.F.R. § 18.3(d)(2).

operates in and of itself to waive any immunity or privilege beyond that strictly conceded to obtain the particular grant.

[11] Waivers of important constitutional rights must generally be knowing and intelligent and consents to their violation must be strictly construed. Since the Seminary has yet to experience any enforcement action, either private or administrative, and there is no evidence that any on-site compliance survey, routine spot check or investigation has been conducted under Title VI, the Court is unable to find any lack of good faith in the Seminary's assertion of religious objections to enforcement of Title VII. The regulation to which the Seminary is potentially subject under Title VI is not coextensive with or entirely similar to that under Title VII. The administrative sanction for violation of Title VI is withdrawal of Veterans Administration approval. Even in a private action for an isolated instance of discrimination, the institution is entitled to decline the aid rather than comply. Given the limited nature of the benefit accruing to the institution from enrollment of veterans, this ability to forego the federal assistance is not an unrealistic alternative.[4] In any event, enforcement of Title VI would be directed at preventing discrimination against veterans using their benefits to attend the Seminary. If the enforcement procedures necessary for this purpose invade religious freedom, they are confined within the boundaries of Title VI and do not reach the employment

[4]With the exception of "reporting fees" received as reimbursement for administrative expenses incurred in meeting the reporting and record-keeping requirements of the Veterans Administration, and the enrollment of less than 300 veterans receiving federal assistance, the Seminary is not the recipient of any funds or grants administered by any governmental agency, including the Department of Health, Education & Welfare.

practices of the Seminary generally.[5] The Court accordingly declines to hold that acceptance of veterans receiving federal assistance constitutes a waiver of religious objections to the more comprehensive and intrusive enforcement possible under Title VII.

Form EEOC-6 is designed for the purpose of monitoring compliance by educational institutions covered by Title VII and not for the purpose of determining entitlement to an exemption from that Act. Defendant Seminary, therefore, cannot be required to complete and return such forms.

Plaintiff's action is accordingly DISMISSED.

---

[5]By its holding of no waiver the Court avoids reaching the difficult constitutional questions posed by the prospect of a thorough vindication of Title VI as to candidates for the ministry attending various seminaries on veterans educational benefits. *In the spirit of NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), *the Court notes the significant risk of infringement* of the free exercise clause if Title VI is enforced to its statutory and judicial limits against seminaries, either by the Department of Health, Education & Welfare on behalf of the Veterans Administration or by individual litigants asserting a private right under Title VI, *see Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); and a significant risk of establishment if the receipt of such federal funds by a seminary or a veteran's entitlement to educational benefits in pursuing the ministry is conditioned too directly on the content of the seminary's religious teachings or practice.

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v.

SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY, Defendant-Appellee.

No. 80-1370.

United States Court of Appeals,
Fifth Circuit.
Unit A

July 17, 1981.

Equal Employment Opportunity Commission brought suit against seminary to compel compliance with Title VII's reporting requirements. The United States District Court for the Northern District of Texas, at Fort Worth, Eldon B. Mahon, J., refused to compel seminary to file requested forms, and EEOC appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) Title VII did not apply to employment relationship between seminary and its faculty; (2) application of Title VII's reporting requirements to seminary's nonministerial employees did not violate establishment clause; and (3) application of Title VII's reporting requirements to seminary's support staff and other nonministers did not violate free exercise clause.

Affirmed in part, and reversed and remanded in part.

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS,* District Judge.

CHARLES CLARK, Circuit Judge:

This case requires us to balance the interest of the federal government in enforcing Title VII against the first amendment rights of a religious institution of higher learning. The Equal Employment Opportunity Commission (EEOC) appeals the judgment of the district court denying its efforts to compel submission of the Higher Education Staff Information Report (EEO-6). Following the standards set out in *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), we affirm in part, and, in part, reverse and remand. 485 F.Supp. 255.

I. FACTS

A. *The Seminary*

The Southwestern Baptist Theological Seminary (Seminary) is a Texas non-profit corporation located in Fort Worth, Texas.[1] According to the Seminary's bylaws, it is owned, operated, and controlled by the Southern Baptist Convention (Convention), a voluntary association of Southern Baptist churches, incorporated in Georgia. The Convention elects the Seminary's trustees, dictates its purpose, and provides sixty percent of its financial support. As announced by the Convention, the Seminary's objective is "to provide theological education, with the Bible as the center of the curriculum for God-called men and women to meet the need for trained leadership in the work of the churches." As described by Dr. Robert Naylor, President Emeritus of the Seminary, its

*District Judge of the Western District of Texas, sitting by designation.

[1]Our factual statements are drawn from the district court's findings of fact and from undisputed testimony heard by the district court.

relationship with local Southern Baptist churches is more functional than structural: "The churches are the source, of course, of the Seminary, provide its constituency and use its product." The Seminary offers degrees only in theology, religious education, and church music; the curriculum is not to be expanded to "provide strictly secular education," according to its bylaws. The Convention does not allow the Seminary to charge tuition.

The approximately 1450 seminarians must meet three requirements of admission beyond the ordinary academic standards. Each applicant must represent that he or she has received a divine appointment to Christian ministry, the spouse (if any) of each prospective student must express a conviction that the student has received such a "call," and the local church of which the candidate is a member must pass a resolution acknowledging his or her personal integrity and commitment to the Christian faith and recommending the individual for admission to the Seminary. Thus, no matter how superior one's academic ability is, religious commitment is the quality that determines admission.

The procedures and criteria governing the Seminary's employment decisions reflect the nature of the Seminary and are the part of the Seminary's operation with which the EEOC is concerned. The Seminary's employees may be divided into three main categories: faculty, administrative staff, and support personnel.

Article VI of the Seminary's bylaws begins: "It shall be the policy of the Seminary to strive for and maintain a faculty composed of persons of unquestionable Christian character, positive and consecrated Christian attitudes, faithful allegiance to the Baptist faith, highest possible scholastic attainments and aptitude for teaching." According to Dr. Russell Dilday, who at the time of

trial was the President of the Seminary, the order of criteria in this provision and in a policy statement entitled "Criteria for Evaluation of Faculty," adopted by the faculty in 1966, is not accidental: scholastic attainments are listed third because of "greater importance than that is the individual's personal characteristics, his relationship to the Lord, the church, and his activities within the denomination." Evidence of this nature caused the district court to find that: "Members of the faculty and administration of [the] seminary are considered ministers and are hired, assigned, advanced, tenured, evaluated and terminated on predominately religious criteria." And again, "Recruitment of faculty and administrators is viewed as a divinely guided 'spiritual quest' mutually pursued by the Seminary and the prospective employee."

The district court also found that the support personnel "perform a bona fide religious and educational function." Since ninety-five percent of these positions are filled by students and spouses of students and faculty, there is a built-in qualification for most of the support personnel. Undisputed testimony reveals that the remaining twenty-two full-time support personnel must be compatible with the "Seminary family," and must display an appreciation for and participation in the mission of the Seminary.

In sum, as found by the district court, the "Seminary regards its employment decisions as divinely guided assessments of each employee's suitability for the position he will occupy in relation to the students and as a representative of the institution . . ."

B. *The Report*

Section 709(c) of Title VII of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000e-8(c), provides in part:

> (c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the [EEOC] shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.

Pursuant to the authority of this section, the EEOC promulgated the following regulation:

> On or before November 30, 1975, and biennially thereafter, every public and private institution of higher education having fifteen (15) or more employees shall file with the Commission or its delegate executed copies of Higher Education Staff Information Report EEO-6 in conformity with the directions set forth in the form and accompanying instructions. Every institution of higher education shall retain at all times, for a period of three years a copy of the most recently filed Report EEO-6 . . .

29 C.F.R. § 1602.50 (1980).

Since the burden of filing this report is discussed herein, we shall briefly describe it. The report is denominated "Higher Education Staff Information (EEO-6)," and consists of six letter-size pages. It first requires an identification of the institution and any parent institution. The filing institution is required to indicate whether it has a contract with the federal government and the

approximate dollar amount of any such contract.[2] The institution must reveal the general job description, length of employment contract, salary bracket, gender, and race or national origin of every employee. This information is not linked to the name of any specific employee, but is rather revealed by means of a complex chart. By the same method, the tenure status of various faculty positions is correlated with the gender and race information of those who hold these positions. The number of "full time staff paid in full from 'soft money' sources" is to be indicated. The same information required regarding full-time, permanent employees also is required for temporary and part-time employees.

The Seminary refused to file EEO-6. The EEOC brought suit to compel compliance pursuant to 42 U.S.C. § 2000e-8(c). The district court, finding that the application of Title VII to any aspect of the employment relationship between the Seminary and its employees leads to excessive governmental entanglement with religion violative of the establishment clause and infringes the Seminary's rights under the free exercise clause of the first amendment, refused to compel the Seminary to file the EEO-6 forms.

II. A SIMILAR CASE: MISSISSIPPI COLLEGE

This case is quite similar to *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980). The parties assert and we recognize that there are three major areas of factual distinctions between this case and *Mississippi College*. The first concerns the nature of the institutions. We noted in *Mississippi College* that the "evidence pre-

[2]In addition to the EEOC, the form is made available to the Office of Federal Contract Compliance, Department of Labor, and the Office for Civil Rights, H.E.W. (now H.H.S.).

sented to the district court makes it readily apparent that the character and purposes of the college are pervasively sectarian." *Id.* at 487. The character and purposes of the Seminary are wholly sectarian. This factual distinction is pertinent not only to the applicability of *Mississippi College*, but also to the test for excessive governmental entanglement. *See* Part III A, *infra*. The Seminary's role is vital to the Southern Baptist Church. No one would argue that excessive intrusion into the process of calling ministers to serve a local church is constitutionally permissible. The Convention's hiring of faculty and other personnel to train ministers for local churches is equally central to the religious mission and entitled to no less protection under the first amendment.

The second distinction is that the subpoena challenged in *Mississippi College* imposed a broader compliance burden than do the EEO-6 reports required here. The subpoena demanded a list of all staff showing name, race, sex, religion, job description, pay, and educational level. Information pertaining to faculty recruiting and promotions, and access to all applications for faculty and administrative positions during the period in issue were also required. *See id.* at 480 n. 3. The requirements of the EEO-6 report, set out above, reveal that the report compels much less detail than the subpoena. Unless the Seminary experiences frequent faculty turnover, the report is less burdensome though it must be filed every two years.

The final area of factual difference between this case and *Mississippi College* is the context in which the government's requests for information was made. In *Mississippi College*, a dissatisfied employee had filed a charge with the EEOC, alleging sex discrimination. The EEOC investigated the charge and issued the subpoena in the

course of that investigation. *Id.* at 480. Here there is no charge of discrimination; the EEOC seeks merely to gather statistical information from educational institutions.

III. CONSTRUCTION OF TITLE VII: *McCLURE*

The Seminary argues that Congress did not intend Title VII to apply to the employment relationship between a church and its ministers, citing *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), and that *McClure's* holding applies to this case. Mrs. McClure brought suit under Title VII of the Civil Rights Act of 1964, claiming that the Salvation Army discriminated against her on account of her gender. The legal boundaries of this court's decision in *McClure* are apparent from the opening paragraphs: "The Salvation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers . . . Restricting our decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy, we affirm the judgment rendered below." *Id.* at 554-555. To reach this result, the court found that the Salvation Army was an "employer engaged in an 'industry affecting commerce,'" within the meaning of § 701(b), (f), and (h) of Title VII, 42 U.S.C. § 2000e(b), (f), (h), but that the exemption found in § 702, 42 U.S.C. § 2000e-1, did not apply. *McClure*, 460 F.2d at 556-58. In addressing the constitutional issues presented, the court found that a serious doubt of constitutionality was raised and concluded that Congress did not intend to regulate the employment relationship between church and ministers. *Id.* at 558-561. The Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), used the same approach to statutory construction as this court did in *McClure*. In *Mississippi College* we determined

that the College could not rely on *McClure's* ultimate holding, because the College was not a church, and its faculty and staff were not ministers. *Mississippi College*, 626 F.2d at 485.

The Seminary asserts its situation is factually distinct from the *Mississippi College* case because it is a church and its faculty and staff are ministers. While the Seminary does not contest that it meets the initial criteria for application of the statute, it argues that section 702 of Title VII exempts it from filing these forms. In this regard, the Seminary asks us to reconsider *McClure's* holding that section 702 does not exempt religious organizations from liability for discrimination based on race, color, sex, or natural origin. The Seminary urges that *Catholic Bishop* requires a modification of *McClure*. However, after both the announcement of *Catholic Bishop* and the filing of the Seminary's brief, this court has reaffirmed *McClure's* validity. *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980). Thus, this holding of *McClure* may not be reexamined by this panel. Nevertheless, we still must compare the facts of *McClure* to those in this case to ensure that the constitutional considerations that mandated the *McClure* holding are equally efficacious here.

McClure's reasoning is grounded in a line of Supreme Court cases dealing with intrachurch disputes. After discussing the "wall of separation" that exists between religion and the state, citing *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), and the need for a compelling interest to justify even an incidental burden, citing *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the court turned to those cases dealing with judicial consideration of matters of purely ecclesiastical concern. Finding that the "rela-

tionship between an organized church and its ministers is its lifeblood," the court held that the maintenance of a private Title VII suit by one such minister against the church would violate the principles embodied in the line of cases from *Watson v. Jones*, 13 Wall. 679, 80 U.S. 679, 20 L.Ed.666 (1871), through *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). *McClure*, 460 F.2d at 558-60. Similarly, those principles would be violated by the EEOC's demand to reveal the details of the employment relationship between a church and its ministers.

While we agree with EEOC that the burden of filing the EEO-6 form is less than the burden of defending a lawsuit, its interest in acquiring information about such relationships is greatly attenuated. The EEOC has denied in this case that it is seeking to enforce any substantive provision of Title VII. It says it is simply gathering information in case Congress wants it. Congress' need for information in an area it cannot constitutionally regulate is not a compelling interest, and the EEOC does not argue that it is. The rationale of *McClure* is fully applicable here.

A. *Is the Seminary a "Church"?*

We come now to the crux of this case: the proper characterization of the Seminary. The EEOC describes the Seminary as a religiously affiliated institution. The Seminary claims it is wholly religious.

[1] Since we have already distinguished *Mississippi College* on this issue, *see* Part II, *supra*, we turn to *McClure*. Our task in discerning the nature of the Seminary and the role of its employees is more difficult than that the court faced in *McClure*. There, all parties

agreed that the Salvation Army was a religion and McClure was a minister, *id.* at 556. Clearly, the Seminary is an integral part of a church, essential to the paramount function of training ministers who will continue the faith. It is not intended to foster social or secular programs that may entertain the faithful or evangelize the unbelieving. Its purpose is to indoctrinate those who already believe, who have received a divine call, and who have expressed an intent to enter full-time ministry. The local congregation that regularly meets in a house of worship is not the only entity covered by our use of the word "church." That much is clear from *McClure*. In the Baptist denomination, the Convention is formed to serve all participating local congregations. The fact that those who choose to participate in the Convention do so voluntarily renders it no less deserving of the protection of *McClure*. Since the Seminary is principally supported and wholly controlled by the Convention for the avowed purpose of training ministers to serve the Baptist denomination, it too is entitled to the status of "church."

B. *Who are the "Ministers"?*

This is a more difficult question. The parties have identified three categories of Seminary employees: faculty, administrative staff, and support staff. The district court concluded that the first two groups should be considered ministers, while the latter group were not "ministers in the formal sense." To the extent that these findings indicate determinations of fact by the district court, they must be accepted unless clearly erroneous. Fed.R.Civ.P. 52. The status of these employees as ministers for purposes of *McClure* remains a legal conclusion subject to plenary review. The Seminary urges that all its employees serve a ministerial function. While religious organizations may designate persons as ministers for their

religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status.

[2] The district court found that the Seminary makes employment decisions regarding faculty members largely on religious criteria. This finding is supported by the record. As previously discussed, the level of personal religious commitment of faculty members is considered more important than their devotion to the Baptist church or their academic abilities, though all of these qualities are desirable. According to Dr. Dilday, President of the Seminary, there is no course taught at the Seminary that has a strictly secular purpose; Dr. Naylor, the Seminary's President Emeritus, testified similarly. Though the record indicates that ministers are ordained by local churches and not by the Seminary, most of the faculty have been ordained. The Seminary expects the faculty to teach by example as well as by other means.[3] The faculty models the ministerial role for the students. Based on the district court's findings of fact, we conclude that the faculty at the Seminary fit the definition of "ministers" for the purpose of applying *McClure*.

[3] The facts in *Mississippi College* were not the same. There, we explained:

> The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment

[3]This fact would not of itself be controlling. *See Mississippi College*, 626 F.2d at 485.

> matters of church administration and thus purely of ecclesiastical concern.

Id. at 485. In this case, the faculty are intermediaries between the Convention and the future ministers of many local Baptist churches. They do instruct the seminarians in the "whole of religious doctrine," and only religiously oriented courses are taught.[4] Thus, the role of the faculty of the Seminary is different from that of Mississippi College's faculty. "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 408 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971). The line, though dimly perceived, is there. *McClure* establishes that Title VII does not apply to the employment relationship between this Seminary and its faculty. Given the unique role of the faculty of any school, they are afforded unique protection. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-502, 99 S.Ct. 1313, 1319, 59 L.Ed.2d 533, 541-42 (1979).

The support staff consists of approximately twenty-two full-time personnel and several hundred part-time personnel who perform a variety of non-academic functions. The part-time workers are almost exclusively students, spouses of students, or spouses of faculty. At least four of the full-time workers have been ordained in the Baptist denomination. By their own testimony, their calling is service in the maintenance department of the Seminary. Thus, we must determine whether under

[4]The record does not reveal whether the faculty members attend to students' religious needs when called upon to do so. The fact that many seminarians serve in various local churches as preachers, music ministers, or youth directors indicates that these fledgling ministers must look, if anywhere, to the faculty for religious guidance.

McClure, though one need not be ordained to be a minister as indicated previously, ordination is a sufficient factor to make one a minister. Our analysis is complicated by the fact that Mrs. McClure, though an ordained minister, was functioning principally as a secretary at the time she was discharged. The failure of any party to challenge Mrs. McClure's "status as a minister engaged in the religious or ecclesiastical activities of the church" relieved this court from clearly explicating the test for such a determination in that case. *See id.* at 556. Moreover, Mrs. McClure's status as an ordained minister, a commissioned officer in the Salvation Army, was neither incidental to nor depreciated by her service as a secretary. According to the district court's fact findings in *McClure*, commissioned officers may be assigned field duty, similar to a local pastorate, or staff duty, consisting of various assignments in one of the Army's regional headquarters. *McClure v. Salvation Army*, 323 F.Supp. 1100, 1101-02 (N.D.Ga.1971). Mrs. McClure's position as a secretary was the staff duty assigned to her. She was still fully qualified and authorized to perform the ceremonies of the Army, which, the district court found, included swearing in officers, conducting weddings and funerals, and dedicating babies. *Id.* at 1101, 1104. The role of the support staff at the Seminary is qualitatively different from Mrs. McClure's role in the Salvation Army.

[4] The undisputed testimony of the Director of the Physical Plant, Mr. James R. Leitch, was that ordination was not a requirement for the positions held by the four ordained ministers. Unlike Officer McClure, these workers' ordination is not an integral part of their total vocation. These support personnel are not engaged in activities traditionally considered ecclesiastical or religious.

Indeed, the district court found that they were not "ministers in the formal sense." We conclude they are not ministers in the *McClure* sense. The same analysis applies to the part-time staff. Though these workers are drawn from a restricted group, and though many of them are training to be ministers or to serve as spouses of ministers, the tasks they perform in these jobs are not of an ecclesiastical or religious nature. With respect to their employment relationship with the Seminary, these employees are not entitled to ministerial status under *McClure*.

[5, 6] Much of the reasoning applied to the faculty is pertinent to some of the administrative staff of the Seminary. The President and Executive Vice President of the Seminary, the chaplain, the deans of men and women, the academic deans, and those other personnel who equate to or supervise faculty should be considered ministers as well. On the other hand, those administrators whose function relates exclusively to the Seminary's finance, maintenance, and other non-academic departments, though considered ministers by the Seminary, are not ministers as we used that label in *McClure*. Their positions are akin to support staff positions. When churches expand their operations beyond the traditional functions essential to the propagation of their doctrine, those employed to perform tasks which are not traditionally ecclesiastical or religious are not "ministers" of a "church" entitled to *McClure*-type protection. In the absence of exact job descriptions of all positions on the administrative staff, we are unable to be precise as to the category of all personnel. Should the parties be unable to agree as to whether any particular administrative staff position is traditionally ecclesiastical or ministerial, the

resolution of the dispute may be referred to the district court.

IV. FIRST AMENDMENT QUESTIONS

[7, 8] The EEOC's regulation requiring form EEO-6 to be filed is the direct subject of the Seminary's challenge. However, since the EEOC's statutory authority to pass such a regulation is not attacked, our analysis focuses on the validity of the statute. Consideration of the constitutionality of the statute may be avoided altogether if its plain meaning avoids any constitutional problem. *See e.g., St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy v. South Dakota*, — U.S.—, 101 S.Ct. 2142, 68 L.Ed.2d—(1981). If the interpretation complained of "presents a significant risk that the First Amendment will be infringed," any ambiguity in the statute is construed in a manner to avoid such constitutional problems. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, 99 S.Ct. 1313, 1320, 59 L.Ed.2d 533, 542 (1979); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). If no such doubts are raised, the interpretation complained of, which ofttimes is that adopted by an administrative agency charged with enforcing the statute, still must be subjected to thorough constitutional analysis. This "second look" is intended to ensure that constitutional issues receive the most careful consideration. *E.E.O.C. v. Mississippi College*, 626 F.2d 477, 485-89 (5th Cir. 1980). The obvious aim of this process is to avoid, if at all possible, ruling on the constitutionality of a statute. The reasons for this aversion to exercising judicial review over legislative acts have been explained many times by the Supreme Court. *See, e.g., Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947); *Ashwander v. TVA*, 297 U.S.

288, 345, 56 S.Ct. 466, 482, 80 L.Ed. 688, 709-710 (1936) (Brandeis, J., concurring).

As stated, the provisions of Title VII do not apply to the church-minister relationship. We continue the analysis now as to those employees of the Seminary that are not "ministers." The framework for this analysis is provided by *Mississippi College*. There, as here, the governmental involvement was challenged as violative of both the free exercise and establishment clauses. In our case, the district court found that application of the reporting requirements of Title VII to the Seminary would impair the Seminary's free exercise of religion and would foster an excessive governmental entanglement with religion. We shall discuss the two religion clauses separately.[5]

A. *The Establishment Clause*

As we noted in *Mississippi College*, the Supreme Court has used a three-prong test to determine whether an act of Congress violates the establishment clause:[6] (1) whether the statute has a secular purpose, (2) whether its primary effect neither advances nor inhibits religion, and (3) whether it fosters "'an excessive government entanglement with religion.'" *Id.* at 486, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91

[5]The precise challenge presented by this case falls between the two religion clauses and between the tests used under them. Though the Seminary complains of "entanglement," it does not argue that Congress is attempting to establish the Baptist or any other religion by enacting Title VII. Entanglement is a concept developed in and used most frequently in the context of establishment clause cases. On the other hand, the Seminary does not claim that the reporting requirements directly burden the exercise of any particular tenet of their faith — the test employed under the free exercise clause. There may come a time when administrative burdens placed upon a religion by a government will be so onerous as to warrant the employment of a new test. The traditional tests suffice in the context of this case.

[6]"Congress shall make no law respecting an establishment of religion . . ." U.S.Const. Amend. 1.

S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971). Here, as in *Mississippi College*, only the third part of the test is in dispute. *Lemon* explained the three factors to be evaluated in determining whether any entanglement is excessive: the character of the institution affected, the nature of the aid (or burden) provided, and the resulting relationship between church and state. *Lemon*, 403 U.S. at 614-615, 91 S.Ct. at 2112, 29 L.Ed.2d at 756-57.

We have already explained, in Parts I and II, *supra*, that the Seminary is wholly sectarian, an arm of the Southern Baptist Convention, owned and controlled by it.

[9] The filing requirement is, of course, a burden rather than an aid to the Seminary. As in *Mississippi College*, the burden complained of here is largely hypothetical. Indeed, filing the form is less a real burden than was the subpoena required of *Mississippi College*. There has been no complaint of discrimination at the Seminary, and there is no particularized investigation into the Seminary's hiring practices. The only aspect of the EEOC's requirements in this case more demanding than those in *Mississippi College* is the biennial nature of the filing requirement. Though this requirement is "ongoing," it is not an "ongoing interference with the [Seminary's] religious practices . . ." The resulting relationship between the Seminary and the government is consequently minimal. Thus, application of Title VII's reporting requirements to the Seminary's non-ministerial employees does not violate the establishment clause. *See Mississippi College*, 626 F.2d at 488.

B. *The Free Exercise Clause*

The first amendment provides: "Congress shall make no law . . . prohibiting the free exercise" of religion.

Again, our opinion in *Mississippi College* identifies a three-part test for constitutional violation:

> (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

Id. at 488, citing *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963),

Since the Seminary does not hold any religious tenet that requires discrimination on the basis of sex,[7] race, color, or national origin, the application of Title VII reporting requirements to it does not directly burden the exercise of any sincerely held religious belief.[8] In fact, the impact of the filing requirements is less than that of complying with the subpoena as in *Mississippi College*. So the first factor weighs against the Seminary's position.

Though the compelling interest of eliminating discrimination exists in this case as well as in *Mississippi College*, the necessary relationship between that interest and the means employed, obviously present in that case, is not so obviously present here. This is particularly true since the EEOC has disavowed any attempt to use these filing requirements to monitor compliance with Title VII. The EEOC maintains that the EEO-6 reports may

---

[7]Dr. Naylor's testimony indicates that the Seminary may have a preference for males in some ministerial positions. *Cf. Mississippi College*, 626 F.2d 487.

[8]As we explained in *Mississippi College*, "the relevant inquiry is not the impact of the statute upon the institution but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs." *Id.* at 488.

be used to determine whether a charge filed in the future is deserving of action. But every datum in these reports could be learned by the exercise of the Commission's subpoena power once an investigation is initiated. While the enforcement of a subpoena in the context of an actual charge of discrimination is certainly vital to the enforcement of Title VII, the regular collection of information that could be obtained by other means when needed to enforce the law is not so vital. Thus, the weights on both sides of the scales are lighter than they were in *Mississippi College*. On the more delicate balance, even this governmental interest justifies the almost non-existent impact on the exercise of religious beliefs.

The final factor to be considered is whether and to what extent the governmental objectives would be impeded by granting an exemption from the reporting requirement. When we discussed this factor in *Mississippi College*, we considered the quantitative and qualitative impact of the college and similar institutions on society and concluded that although the number of such religious educational institutions is small, their impact on society is great because of their role in educating the next generation. If such an education is given in an atmosphere of discrimination, the result could seriously undermine our congressionally declared policy of eliminating discrimination. *Id.* at 489. In today's case, the possibility of undermining congressional policy is not as great as it was in *Mississippi College*. There are fewer institutions like the Seminary than there were like the College. More importantly, the qualitative impact of the Seminary on society in general is reduced because all students at the Seminary have expressed a desire to enter full-time religious service. Though some might think it desirable for local church ministers to espouse

antidiscriminatory ideas, the government is surely prohibited from requiring or forbidding such actions. Further, as mentioned before, no one has charged that the Seminary discriminates in violation of Title VII. The dangers we discussed in *Mississippi College* are hypothetical here.

Finally, the EEOC represents the function of the EEO-6 form to be that of gathering information. Thus, the EEOC's direct "objective" could be said to be surveying employment in institutions of higher learning, not eliminating discrimination.

[10] Though the scale is not heavily tipped in either direction, we conclude that an exemption for the Seminary's support staff and other non-ministers is not constitutionally compelled. Congress and the EEOC may seek the information in the EEO-6 report subject to the limitations we have discussed here and in *Mississippi College*.

Precedent does not compel the EEOC to refrain from requiring the Seminary to file the EEO-6 form as to their non-minister employees. Neither the Supreme Court nor this court has held that the employment relationship between a church and all of its employees is a matter of purely ecclesiastical concern.

The Judgment of the district court is reversed in part and remanded for entry of judgment consistent with this opinion.

AFFIRMED IN PART, AND, IN PART REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-1370

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

versus

SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 17, 1981, 5 Cir., 198_, ____ F.2d ____).

(September 16, 1981)

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS,* District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16;

*District Judge of the Western District of Texas, sitting by designation.

Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

APPENDIX C

Civil Rights Act of 1964, Title VII, as amended by the Equal Employment Opportunity Act of 1972:

1. Section 701(a),(b) (42 USCA 2000e(a),(b))

"For the purposes of this subchapter—

"(a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."

2. Section 702 (42 USCA §2000e-1):

"This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to

the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Pub.L. 88-352, Title VII, §702, July 2, 1964, 78 Stat. 255; Pub.L. 92-261,§3, Mar. 24, 1972, 86 Stat. 103."

3. Section 703(e) (42 USCA §2000e-2(e)):

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."

4. Section 709(c) (42 USCA §2000e-8(c)):

"(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employee, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropri-

ate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply."

APPENDIX D

29 C.F.R. §1602.47:

§1602.47 Definition

Under subparts O and P of this part, the term 'institution of higher education' means an institutional system, college, university, community college, junior college, and any other educational institution which offers an associate degree, baccalaureate degree or higher degree or which offers a two year program of college level studies without degree. The term 'college level studies' means a post secondary program which is wholly or principally creditable toward a baccalaureate degree or terminates in an associate degree."

Opposition

Office - Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS

No. 81-1115

In the Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL J. CONNOLLY
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

MELISSA LANGA
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTIONS PRESENTED

1. Whether Section 709(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(c), authorizes the Equal Employment Opportunity Commission to require a religious seminary to make periodic reports on the composition of its work force, excluding faculty and other employees equivalent to a "minister."

2. Whether the imposition of such a reporting requirement on a religious seminary violates the Religion Clauses of the First Amendment.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes and regulations involved 2

Statement 2

Argument 5

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Chandler v. *Roudebush*, 425 U.S. 840 9

Dolter v. *Wahlert High School*, 483 F. Supp. 266 7

EEOC v. *Mississippi College*, 626 F. 2d 477, cert. denied, No. 80-1703 (June 29, 1981) 6, 7, 12

EEOC v. *Pacific Press Publishing Association*, 482 F. Supp. 1291 (appeal docketed Apr. 23, 1980) 7, 8

Engel v. *Vitale*, 370 U.S. 421 12

Griggs v. *Duke Power Co.*, 401 U.S. 424 14

Lemon v. *Kurtzman*, 403 U.S. 602 12

Lynch v. *Alworth-Stephens Co.*, 267 U.S. 364 9

McClure v. *Salvation Army*, 460 F. 2d 553, cert. denied, 409 U.S. 896 ..... 3, 4, 6, 7, 9

NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 ..... 5-6, 11

Page

Cases—Continued:

National Organization for Women v. *President and Board of Trustees of Santa Clara College*, 16 F.E.P. Cas. 1152 7

Ritter v. *Mount St. Mary's College*, 23 F.E.P. Cas. 734 7

Sherbert v. *Verner*, 374 U.S. 398 5

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 14

United States v. *Ballard*, 322 U.S. 78 13

United States v. *Lee*, No. 80-767 (Feb. 23, 1982) 15

United States v. *Seeger*, 380 U.S. 163 13

Walz v. *Tax Commission*, 397 U.S. 664 11

Whitney v. *Greater New York Corporation of Seventh-Day Adventists*, 401 F. Supp. 1363 ... 7

Wisconsin v. *Yoder*, 406 U.S. 205 ..... 5, 13

Constitution, statutes and regulations:

United States Constitution:

First Amendment 2, 3, 5, 6, 11, 12, 13

Establishment Clause 5, 11

Free Exercise Clause 3, 5, 11, 13

Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000a *et seq.*:

Title VI, Section 601, 42 U.S.C. 2000d 3

Page

Constitution, statutes and regulations—Continued:

Title VII, 42 U.S.C. 2000e *et seq.*:

Section 702, 42 U.S.C. 2000e-1 ..... 7, 8, 9, 10, 12
Section 703(e)(2), 42 U.S.C. 2000e-2(e)(2) ... 9
Section 709(c), 42 U.S.C. 2000e-8(c) 2

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 5-6

29 C.F.R. 1602.50 2

38 C.F.R. Part 18 3

Miscellaneous:

110 Cong. Rec. 12864 (1964) 8

118 Cong. Rec. (1972):

p. 1981 10

p. 1982 10

pp. 1981-1982 8

p. 1995 10

p. 7167 ..... 8, 10

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 8

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1115

SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-16 to A-36) is reported at 651 F. 2d 277. The opinion of the district court (Pet. App. A-1 to A-15) is reported at 485 F. Supp. 255.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1981. A petition for rehearing was denied on September 16, 1981 (Pet. App. A-37 to A-38). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulation set forth at Pet. App. A-39 to A-43, 29 C.F.R. 1602.50 provides in pertinent part:

> On or before November 30, 1975, and biennially thereafter, every public and private institution of higher education having fifteen (15) or more employees shall file with the Commission or its delegate executed copies of Higher Education Staff Information Report EEO-6 in conformity with the directions set forth in the form and accompanying instructions.

STATEMENT

Pursuant to its authority under Section 709(c) of Title VII, 42 U.S.C. 2000e-8(c), the Equal Employment Opportunity Commission in 1975 promulgated 29 C.F.R. 1602.50, which requires higher education institutions to file, biennially, a six-page document entitled EEO-6. The form requests numerical data as to the racial, sexual, and ethnic composition of the institution's work force (Pet. App. A-20 to A-21).

Petitioner is an educational institution owned and operated by the Southern Baptist Convention (Pet. App. A-17). Its objective is to provide a "theological education," and its students must meet certain religious requirements of admission, including having received a divine appointment to Christian ministry (*id.* at A-17 to A-18). Petitioner has refused to file EEO-6 reports, claiming that is is not covered by Title VII, and, alternatively, that any such coverage of it would violate the First Amendment. Accordingly, in May 1977, the Commission brought this suit in the United States District Court for the Northern District of Texas to compel petitioner to comply with the Commission's reporting requirement.

Relying on *McClure* v. *Salvation Army*, 460 F. 2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), the district court dismissed the Commission's complaint (Pet. App. A-1 to A-15). The court found that petitioner was covered as an employer by the provisions of Title VII (*id.* at A-8), but held that requiring it to file the EEO-6 form would violate the First Amendment. The court ruled that petitioner was indistinguishable from a "church" and that its faculty and administrators were "ministers" and stated that any application of Title VII to any aspect of this employment relationship would violate the Free Exercise Clause of the First Amendment (*id.* at A-9 to A-10). Applying the holding of *McClure* that Congress did not intend Title VII "to regulate the employment relationship between church and minister" (460 F. 2d at 560-561), the court held that petitioner was not required to complete the EEO-6 form with respect to these employees.

The district court recognized that the support personnel employed by petitioner could not be considered ministers. But it found that these employees "perform a bona fide religious and educational function" in that "they are encouraged and expected to view their work as fulfillment of a religious calling," although they are not required to be members of the Baptist Church (*id.* at A-6), and that petitioner's employment decisions are divinely guided (*id.* at A-7). Accordingly, the court held that compliance with the EEO-6 reporting requirement with respect to these employees as well would "lead inevitably to excessive governmental entanglement with religion" in violation of the First Amendment (*id.* at A-10 to A-11).[1]

---

[1]The court also rejected the argument that petitioner had waived any objection to the Title VII reporting requirement by seeking accreditation under 38 C.F.R. Part 18, thereby subjecting itself to the provisions of Title VI, 42 U.S.C. 2000d (Pet. App. A-11 to A-15).

The court of appeals affirmed in part and reversed and remanded in part (Pet. App. A-16 to A-36). It agreed with the district court's holding that petitioner is essentially a "church" and thus entitled to *McClure's* limited exemption from Title VII with respect to its employment relations with its "ministers" (*id.* at A-26). With respect to the question of which employees are "ministers," the court of appeals agreed that the faculty, most of whom are ordained, serve a wholly religious function: they are entrusted with teaching religious doctrine to the future ministers, they serve as intermediaries between the Convention and the seminarians, and they serve as models of the ministerial role (*id.* at A-27 to A-28). Thus, the court found that the faculty are "ministers" and affirmed the district court's holding that they are outside the scope of Title VII.

With respect to the support staff, however, the court noted that they are employed in areas not "traditionally considered ecclesiastical or religious" (Pet. App. A-29) and thus, as the district court found (*id.* at A-6), they are not ministers within the meaning of *McClure* (*id.* at A-30). Accordingly, the court held that these employees fall within Title VII's jurisdiction and that petitioner is obliged to submit EEO-6 data as to them. With respect to the administrative staff, the court identified certain staff members, such as those who supervise faculty, as entitled to minister status. Other administrators, however, whose function relates to finance or other non-academic departments are not ministers within the meaning of *McClure*. The court held that those employees who do not perform "traditional functions essential to the propagation of [Baptist] doctrine" but rather perform tasks that "are not traditionally ecclesiastical or religious" are covered by Title VII. The precise determination of which employees fall within this category was left to be determined on remand (*id.* at A-30 to A-31).

The court of appeals then considered the question whether the application of the EEO-6 requirement to nonminister employees violates the First Amendment. With respect to the Establishment Clause, the court noted that the reporting regulation clearly has a secular purpose that neither advances nor inhibits religion; the only conceivable Establishment Clause problem is whether it fosters an excessive entanglement between government and religion (Pet. App. A-32 to A-33). Because petitioner had raised only "hypothetical" burdens associated with compliance and because the biennial report is not an ongoing interference with religious practices, petitioner's resulting relationship with the government would be "minimal" (*id.* at A-33). Hence, the court concluded that the reporting requirement creates no unconstitutional entanglement (*ibid.*).

With respect to the Free Exercise Clause, the court noted that petitioner and the Baptist Convention do not embrace religious tenets that require discrimination on the basis of race, sex, color, or national origin; therefore Title VII does not burden the exercise of any sincerely held religious belief (Pet. App. A-34). Under the tests enumerated by this Court in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the court concluded that the reporting requirement as applied to nonministerial employees does not violate the Free Exercise Clause (*id.* at A-34 to A-36).

ARGUMENT

1. Petitioner contends (Pet. 12-16) that, in light of *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the court of appeals erred in concluding that religious institutions, such as a seminary, come within the coverage of Title VII as employers. This contention is without merit.

In *Catholic Bishop*, the Court held that, in the absence of a showing of the "affirmative intention of the Congress clearly expressed," it would not construe the National

Labor Relations Act, 29 U.S.C. 151 *et seq.*, to cover parochial school teachers, where a preliminary inquiry showed that the exercise of such jurisdiction would present serious First Amendment problems. 440 U.S. at 501-507. This decision has no application here, however, both because the statutory basis of coverage is clear (see pages 6-11, *infra*) and because such coverage does not raise serious First Amendment problems like those involved in *Catholic Bishop* (see pages 11-15, *infra*).

In holding that petitioner is covered as an employer under Title VII, the court of appeals relied upon its earlier decisions in *EEOC* v. *Mississippi College*, 626 F. 2d 477 (5th Cir. 1980), cert. denied, No. 80-1703 (June 29, 1981), and *McClure* v. *Salvation Army*, 460 F. 2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), in which the court considered constitutional challenges to the application of Title VII to religious organizations. After thoroughly examining the language and legislative history of Title VII, the Fifth Circuit concluded in *McClure* that (460 F. 2d at 558):

> The language and legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

Petitioner contends that *Catholic Bishop* requires a reexamination of this holding. As the court below noted (Pet. App. A-23), however, the *McClure* court used the same approach to statutory construction as *Catholic Bishop*, and *Mississippi College* was decided subsequent to *Catholic Bishop*. There is, accordingly, no more reason for this Court to grant review here than there was in those cases, in which certiorari was denied.

Moreover, the holding of the court below is consistent with that of every court to have considered the application to religious organizations of Title VII's prohibition of discrimination in employment on the basis of race, color, sex, or national origin. *EEOC* v. *Mississippi College*, *supra*, 626 F. 2d at 484; *McClure* v. *Salvation Army*, *supra*, 460 F. 2d at 558; *Dolter* v. *Wahlert High School*, 483 F. Supp. 266, 268-269 (N.D. Iowa 1980); *Ritter* v. *Mount St. Mary's College*, 23 F.E.P. Cas. 734, 736 (D. Md. 1980); *EEOC* v. *Pacific Press Publishing Association*, 482 F. Supp. 1291, 1302-1306 (N.D. Cal. 1979) (appeal docketed Apr. 23, 1980); *National Organization for Women* v. *President and Board of Trustees of Santa Clara College*, 16 F.E.P. Cas. 1152, 1156 (N.D. Cal. 1975). See also *Whitney* v. *Greater New York Corporation of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975).

In reaching the conclusion that Congress intended to prohibit religious organizations from discriminating in employment on the basis of race, sex, or national origin, the courts have noted that, unlike the National Labor Relations Act, which is silent with respect to the coverage of religious organizations, Section 702 of Title VII, 42 U.S.C. 2000e-1, explicitly provides a limited exemption for religious employers from the prohibition of religion-based discrimination contained in Title VII. *Dolter* v. *Wahlert High School*, *supra*, 483 F. Supp. at 268-269; *Ritter* v. *Mount St. Mary's College*, *supra*, 23 F.E.P. Cas. at 736-737; *EEOC* v. *Pacific Press Publishing Association*, *supra*, 482 F. Supp. at 1303. In providing this limited exemption, Congress clearly and unequivocally demonstrated its intent that religious employers should otherwise be covered by Title VII.

Congress' intent is also well evidenced by the legislative history of the statute. During consideration of Title VII in 1964, and of the Equal Employment Opportunity Act in 1972, Congress considered and rejected proposals that

would have completely excluded religious employers from coverage under Title VII.[2] See *EEOC* v. *Pacific Press Publishing Association, supra,* 482 F. Supp. at 1301-1307 (detailed analysis of legislative history of Title VII coverage of religious employers). Furthermore, the section-by-section analysis of the 1972 amendments provides the clearest possible statement of affirmative congressional intent that religious organizations should be covered by Title VII (118 Cong. Rec. 7167 (1972); emphasis added):

> The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow such entities to employ individuals of a particular religion in all their activities instead of the present limitation to religious activities. *Such organizations remain subject to the provisions of Title VII with regard to race, color, sex, or national origin.*

The plain language of Section 702, together with the explicit confirmation of congressional intent contained in the legislative history, conclusively show the affirmative intent of Congress, clearly expressed, that Title VII apply to religious employers.

Petitioner contends (Pet. 14), however, that while Title VII may apply to certain "religiously affiliated" employers, Congress did not intend that it apply to a "church," with which the court of appeals equated petitioner. This purported distinction between churches and other religious organizations finds no support in the language or the legislative history of Title VII.

---

[2]H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963); Clark-Case substitute bill, amendment No. 871, 110 Cong. Rec. 12864 (1964); Ervin-Allen amendment No. 815, 118 Cong. Rec. 1981-1982 (1972).

The crux of petitioner's argument is that Title VII does not use the specific word "church." Because the grant of a limited exemption for religious discrimination in Sections 702 and 703(e)(2) of Title VII, 42 U.S.C. 2000e-1 and 2000e-2(e)(2), refers specifically to employment by a "religious corporation, association, educational institution, or society," but does not mention the word "church," petitioner contends that those sections give no indication that Congress intended to include churches as employers under Title VII. This argument is fanciful. It cannot seriously be disputed that "churches" are within the "plain, obvious and rational" meaning (see *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976), quoting *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)) of the phrase "religious corporations, associations, educational institutions, and societies" and, in the absence of any indication in the statute, there is no basis for conjecturing that Congress intended to exclude churches completely from Title VII.[3]

The legislative history—indeed, the very Senate debate cited by petitioner (Pet. 14-15)—strongly supports this conclusion. In 1972 Senator Ervin proposed an amendment that would have broadened the Section 702 exemption to exclude all employees of educational institutions and religious employers from all Title VII coverage. As petitioner notes (Pet. 15), one of the stated purposes of the amendment was to exempt churches from Title VII coverage and thus, in Senator Ervin's words, to remove entirely the "political hands of Caesar" from the "employment practices of

---

[3]Moreover, of course, petitioner is not a "church." In the words of the court of appeals, petitioner is a "non-profit [educational] corporation * * * owned, operated, and controlled by * * * a voluntary association of Southern Baptist Churches" (Pet. App. A-17). Thus, notwithstanding the court of appeals' conclusion that, for purposes of applying its decision in *McClure*, petitioner should be treated as a "church," it is undeniable that petitioner, an incorporated religious educational institution, plainly falls within the literal language of Section 702.

churches of God." 118 Cong. Rec. 1981 (1972). This amendment was defeated by the Senate. 118 Cong. Rec. 1995 (1972). During the course of the debate, Senator Ervin made it absolutely clear that he objected to Title VII as it stood precisely because it did not grant a complete exemption from Title VII for "churches." Referring specifically to the language of Section 702,[4] he stated: "This applies to *churches*, convents, monasteries; it applies to religious corporations, whether they are running a school or not. It applies to religious associations. It applies to religious societies." 118 Cong. Rec. 1982 (1972) (emphasis added). Senator Williams, a sponsor of the legislation, did not dispute this characterization of the scope of Section 702 as including churches. Rather, he argued in opposition to Senator Ervin's amendment that the Section 702 exemption from the ban on religious discrimination for employees engaged in religious activities was sufficient protection for religious employers. 118 Cong. Rec. 1982 (1972).[5] When

---

[4]Senator Ervin referred to the version of Section 702 appearing in the Senate bill S. 2515. This version provided (118 Cong. Rec. 1982 (1972)):

> This title shall not apply to * * * a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its religious activities.

A subsequent amendment extended the exemption to all employees of religious employers. See 118 Cong. Rec. 7167 (1972).

[5]Petitioner argues (Pet. 15-16) that Senator Williams' statements create "ambiguity" as to Congress' intent to apply Title VII to the "wholly religious activities of churches." This argument mischaracterizes the issue in this case and distorts the obvious meaning of Senator Williams' words when read in context. This case does not involve the application of Title VII to the "wholly religious activities" of a church. Rather, it involves application of Title VII to petitioner's employment practices with respect to persons "employed to perform tasks which are not traditionally ecclesiastical or religious," such as maintenance (Pet. App. A-30). In any event, it is clear that Senator Williams' statement about "religious activities" was simply a reference to the language of the

Senator Ervin's amendment was defeated, the status of churches as employers under Title VII remained.

In short, there can be no doubt that the consideration that Congress gave to the application of Title VII to religious employers and its decision to afford such employers only a limited exemption from the prohibition on religious discrimination apply with equal force to the employment practices of "churches." Therefore, the application of the Commission's EEO-6 reporting requirement to petitioner's employment of support personnel and other non-minister employees is not inconsistent with this Court's decision in *Catholic Bishop*.

2. Petitioner contends (Pet. 16-20) that requiring it to complete the EEO-6 reporting form violates the First Amendment. The court of appeals correctly concluded, however, that a requirement that petitioner periodically report to the Commission data concerning its non-minister employees does not violate either the Establishment Clause or the Free Exercise Clause because it creates no significant entanglement between the government and petitioner and does not have any direct impact on petitioner's religious beliefs or practices (Pet. App. A-31 to A-36).

a. Relying on *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), petitioner's primary contention is that any application to it of Title VII violates the Establishment Clause because it fosters excessive government "entanglement" with religion. At the outset, we note that petitioners do not appear to have made out a prima facie claim of an Establishment Clause violation. The Establishment Clause is violated by the enactment of a law that establishes a religion or

---

version of the exemption contained in the Senate bill, which permitted religious discrimination by religious employers with respect to employees engaged in religious activities. See note 4, *supra*.

takes a step that could lead to such establishment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962). Here, petitioner makes no assertion that Title VII impermissibly assists the exercise of religion.

In any event, the court below correctly concluded that there is no danger of excessive entanglement here. Indeed, petitioner does not seriously contend that the reporting requirement involved here creates unconstitutional entanglement itself, but relies instead on the potential impact that Title VII coverage may have on petitioner's employment practices (see Pet. 18-19). While the court of appeals did not address these "largely hypothetical" concerns in detail here (see Pet. App. A-33), it referred to its earlier decision in *EEOC* v. *Mississippi College*, *supra*, where it considered in detail and rejected similar constitutional objections to the application of Title VII to the employment practices of a religious college. In *Mississippi College*, the court of appeals concluded that the safeguards provided in Title VII—the exemption for religion-based discrimination contained in Section 702 of Title VII and the employer's right to a *de novo* hearing in federal court before any adjudication of a Title VII violation could occur—minimize the potential impact of Title VII enforcement on an employer's religious practices and limit the scope and effect of the ensuing relationship between the federal government and the employer. *EEOC* v. *Mississippi College*, *supra*, 626 F. 2d at 487-488. Thus, the potential government involvement under Title VII falls far short of that "comprehensive, discriminating, and continuing state surveillance" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619) that this Court has recognized as raising First Amendment concerns.

Petitioner contends (Pet. 16-17) that the aspect of the court of appeals' decision that *exempts* ministers from Title VII itself creates impermissible government entanglement

by "subjecting to continuing discussion between [petitioner] and government the question of which of [petitioner's] employees are 'ministers' " (Pet. 16). This contention is without merit.

Petitioner overstates the nature of the necessary inquiry, which in fact is limited in scope and duration. The court of appeals merely remanded to the district court for a one-time determination of which administrative employees should be characterized as ministers—a determination that it expected could be made solely by examining the job descriptions and that probably would not be contested by the parties (see Pet. App. A-30). Nor does this determination require inquiry into petitioner's religious doctrine. It depends simply on whether the administrative employee performs "traditionally ecclesiastical or religious" functions. The determination whether a particular staff position is considered "ministerial" for purposes of application of Title VII has no effect on petitioner's own classification of that position for religious purposes or its ability to use religious criteria in staffing the positions—a practice recognized as lawful under Title VII.[6]

b. The court of appeals also correctly concluded that the reporting requirement imposes no burden on the exercise of religion that violates the Free Exercise Clause. Contrary to petitioner's suggestion (Pet. 19-20), application of Title VII

---

[6]Indeed, even if the classification of administrative positions for reporting purposes did involve some inquiry into religious doctrine, which it does not, that inquiry would not constitute impermissible entanglement. This Court has recognized that some limited inquiry into religious matters in the course of resolving certain purely secular issues does not constitute a First Amendment violation. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972); *United States* v. *Seeger*, 380 U.S. 163, 185 (1965); *United States* v. *Ballard*, 322 U.S. 78 (1944).

to the seminary's non-minister employees would not interfere with its present practice of relying primarily on religious criteria in making employment decisions. With respect to a religious employer, Title VII prohibits only those employment practices that constitute discrimination on the basis of race, color, sex, or national origin. Because petitioner does not contend that any of its religious beliefs require discrimination on the basis of race, color, sex, or national origin, there is no inherent conflict between Title VII and petitioner's free exercise of religion.

Petitioner suggests (Pet. 19-20), however, that the threat of a Title VII investigation will inhibit it from freely choosing its support staff on the basis of religious considerations. Although the Commission's investigation of charges of race and sex discrimination may require that officials of religious organizations explain allegedly discriminatory actions, there is no reason to believe that the necessity for articulating the reason for a challenged action will have a chilling effect on the exercise of religion, any more than the necessity for articulating valid business reasons will chill the actions of any other employer. Even if a prima facie case of employment discrimination is established on the basis of a particular employment decision, an employer will not be liable under Title VII if he can articulate some legitimate, nonpretextual, nondiscriminatory reason for the action. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). In the case of a religious employer, a showing that a particular employment decision was made on the basis of an individual's religion, rather than race, sex, or national origin, would constitute such a defense. Similarly, Title VII's prohibition against facially neutral employment practices that have disparate impact based on race, color, sex, or national origin, does not apply to practices that are justified by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). An employer like

petitioner whose business is "training ministers for the Southern Baptist churches and missions" (Pet. App. A-3) may maintain employment standards necessary to the accomplishment of that purpose, even if such standards have a disparate impact.

When the provisions of Title VII are properly understood, it is clear that the court of appeals' holding that the application of the statute to petitioner will not significantly burden the free exercise of religion is fully consistent with the principles established by this Court. See generally *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

MICHAEL J. CONNOLLY
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

MELISSA LANGA
Attorney
Equal Employment Opportunity Commission

MARCH 1982

DOJ-1982-03